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In the Supreme Court of the United States

OCTOBER TERM, 1957

McKINLEY E. GOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	4
Summary of Argument	5
Argument	11
Introduction	11
I. The three narcotics offenses are separate since the three prohibitions originated in separate enactments, in the years 1909, 1914, and 1919, respectively, and the elements are different, each imposing separate kinds of duties having different purposes	13
A. The three narcotics provisions have distinct functions in the enforcement of the ultimate end of suppressing the illegal traffic in narcotics	17
1. The 1909 import statute	18
2. The 1914 written order form requirement	19
3. The 1919 stamp tax requirement	20
B. Amendments subsequent to the *Blockburger* decision have merely increased the penalties for each offense and have not changed the character of the offenses proscribed	27
1. The 1937 legislation increasing penalties in the case of second and subsequent offenders	28
2. The Boggs Act of 1951	29
3. The 1956 legislation	35
II. There is no double jeopardy if the offenses are different. The relationship among closely related offenses has properly been left for consideration by the sentencing judge	38
Conclusion	53

CITATIONS

Cases:

	Page
Abbate v. *United States*, No. 534, this Term	45
Adams v. *United States*, 220 F. 2d 297	47
Albrecht v. *United States*, 273 U.S. 1	14, 38, 40, 43
American Tobacco Co. v. *United States*, 328 U.S. 781	39
Ballerini v. *Aderholt*, 44 F. 2d 352	26
Bell v. *United States*, 349 U.S. 81	16, 44, 50
Blockburger v. *United States*, 284 U.S. 299	5, 6, 8, 9, 11, 12, 13, 14, 17, 23, 24, 25, 26, 27, 29, 30, 36, 37, 39, 41, 46, 50, 51, 52
Burton v. *United States*, 202 U.S. 344	15, 38, 42
Carter v. *McClaughry*, 183 U.S. 365	38
Corollo v. *Dutton*, 63 F. 2d 7	26
Cosgrove v. *United States*, 224 F. 2d 146	46
Diaz v. *United States*, 223 U.S. 442	38
Direct Sales Co. v. *United States*, 319 U.S. 703	24
Ebeling v. *Morgan*, 237 U.S. 625	41
Everett v. *United States*, 227 F. 2d 457	35
Fong Haw Tan v. *Phelan*, 333 U.S. 6	29
Gavieres v. *United States*, 220 U.S. 338	16, 40
Jones, James v. *United States*, No. 446 Misc., this Term	50
Kenny v. *United States*, 236 F. 2d 128, certiorari denied, 352 U.S. 894	46
King v. *United States*, 280 U.S. 521	38
Korematsu v. *United States*, 323 U.S. 214	39
McDade v. *United States*, 206 F. 2d 494	26
Michener v. *United States*, 157 F. 2d 616	43
Morey v. *Commonwealth*, 108 Mass. 433	39
Morgan v. *Devine*, 237 U.S. 632	38, 40
Nigro v. *United States*, 276 U.S. 332	8, 14, 21, 22, 23
Pereira v. *United States*, 347 U.S. 1	39
Pinkerton v. *United States*, 328 U.S. 640	39
Prince v. *United States*, 352 U.S. 322	17, 45
Rex v. *Vandercomb*, 2 Leach C.C. 708 (1796)	39
Sealfon v. *United States*, 332 U.S. 575	10, 45, 46
Simon v. *United States*, 225 F. 2d 260	46
United States v. *Adams*, 281 U.S. 202	38, 45
United States v. *Bayer*, 331 U.S. 532	39
United States v. *Brisbane*, 239 F. 2d 859	34
United States v. *Curzio*, 170 F. 2d 354	46
United States v. *Jin Fuey Moy*, 241 U.S. 394	20, 21
United States v. *Kaadt*, 171 F. 2d 600	46

Cases—Continued

	Page
United States v. *Kahriger*, 345 U.S. 22	23
United States v. *Lewis*, 227 F. 2d 524, certiorari denied, 350 U.S. 974	35
United States v. *Michener*, 331 U.S. 789	15, 16, 39, 43
United States v. *Universal Corp.*, 344 U.S. 218	44
United States v. *Williams*, 341 U.S. 58	45
Yates v. *United States*, 354 U.S. 298	46
Yawn v. *United States*, 244 F. 2d 235	46

Statutes:

Act of February 9, 1909 (35 Stat. 614)	9, 17, 18, 19, 24
Act of January 17, 1914 (38 Stat. 275)	18
Act of February 24, 1919 (40 Stat. 1130)	20
Act of August 12, 1937 (50 Stat. 627)	28, 30, 32
Act of August 9, 1950, 64 Stat. 427, amending 49 U.S.C. 781(b)	25
Boggs Act of 1951, (65 Stat. 767)	8, 23, 29, 30, 32, 35
Sections 1	29
2	29-30
Federal Youth Corrections Act, 18 U.S.C. § 5010	48
Harrison Narcotic Act (38 Stat. 785, as amended),	7, 11, 19, 24, 28, 29
Sections 2	19
7	19
8	19
9	19
12	19
Internal Revenue Code of 1939, Section 2557(b)(1)	29, 31
Internal Revenue Code of 1954:	
Sections 4704(a)	2, 3, 4
4705(a)	2, 3, 4
7201	24
7203	24
7237(a)	2, 3, 32
Narcotic Control Act of 1956 (70 Stat. 567)	8, 35, 36, 48
Narcotic Drugs Import and Export Act, May 26, 1922, 42 Stat. 596	30, 37
Narcotic Drugs Import and Export Act, Section 2(c), as amended, 65 Stat. 767 (21 U.S.C. 174)	2, 4, 28, 29, 35, 36, 47
28 U.S.C. 2255	5

Miscellaneous:

	Page
A. L. I. Model Penal Code, Tentative Draft No. 5	40
Annual Reports of the Director of the Administrative Office of the United States Courts (1954-1957)	47-48
97 Cong. Rec. 8196	32
8197-8200	33
8204-8209	33
13676	33
Hearings before the Senate Special Committee to Investigate Organized Crime, 82d Cong., 1st Sess.	33
Hearings before Subcommittee of Committee on Ways and Means, 82d Cong., 1st Sess., on H.R. 3490	33
Hearings before the Subcommittee on Improvements in the Federal Criminal Code, of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., pursuant to S. Res. 67	48-49
Hearings on the Traffic in and Control of Narcotics and Barbituates before the House Committee on Ways and Means, 84th Cong.	49
House Doc. No. 33, 63d Cong., 1st Sess., April 21, 1913	19
H. Rep. No. 23, 63d Cong., 1st Sess. to accompany H.R. 6282, June 24, 1913	20
H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, p. 36	21
H. Rep. No. 1122, 75th Cong., 1st Sess.	28
H. Rep. No. 635, 82d Cong., 1st Sess.	30, 31, 34
H. Rep. No. 2388, 84th Cong., 2d Sess.	36
Report of the United States Treasury Department, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, for the year ended December, 1950	23
Sen. Doc. No. 157, 63d Cong., 1st Sess., August 9, 1913, p. 87	20
S. Rep. No. 258, 63d Cong., 2d Sess., February 18, 1914	20
S. Rep. No. 617, 65th Cong., 3d Sess., December 6, 1918, p. 56	21
S. Rep. No. 883, 75th Cong., 1st Sess.	28
S. Rep. No. 1051, 82d Cong., 1st Sess., October 1, 1951	32, 34

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 668

MCKINLEY E. GORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the Court of Appeals are reported at 244 F. 2d 763.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1957 (R. 18-19). The petition for a writ of certiorari was filed on July 5, 1957, and was granted on December 16, 1957 (R. 19). 355 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three consecutive sentences could properly be imposed for narcotics offenses where the indictment contained six counts, the first three of which related to

a single sale of narcotics and alleged one offense against the Narcotic Drug Import and Export Act, one offense against the Internal Revenue Code's stamped package requirement, and one offense against the Internal Revenue Code's requirement of a written order form, and the next three counts charged similar offenses with respect to a separate sale of narcotics on a different day.

STATUTES INVOLVED

The Narcotic Drugs Import and Export Act, Sec. 2(c), 65 Stat. 767 (21 U.S.C. 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. * * *

The Internal Revenue Code of 1954, Sections 4704(a), 4705(a), 7237(a), 68A Stat. 550-551, 860, as

amended, 69 Stat. 3 (26 U.S.C. Supp. III, 4704(a), 4705(a), 7237(a)):

Sec. 4704. *Packages.*

(a) *General Requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Sec. 4705. *Order Forms.*

(a) *General Requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Sec. 7237. *Violation of laws relating to Narcotic Drugs and to Marihuana.*

(a) *Violation of Law Relating to Opium and Coca Leaves and Marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided [such as sections 4704(a) and 4705(a), *supra*], shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less

than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * * .

STATEMENT

In a six-count indictment returned on May 9, 1955, in the United States District Court for the District of Columbia, petitioner was charged with narcotics offenses as follows: Count 1—sale, on February 26, 1955, of 20 capsules of heroin and 3 capsules of cocaine not in pursuance of a written order (in violation of Section 4705(a) of the Internal Revenue Code); Count 2—purchase, sale, dispensing, and distribution of these drugs, on that date, not in or from the original stamped package (in violation of Section 4704 of the Internal Revenue Code); and Count 3—facilitating the concealment and sale of the heroin on that date, with knowledge that it had been unlawfully imported (in violation of the Narcotic Drugs Import and Export Act, Section 2(c)). Counts 4, 5, and 6 charged violations of the same provisions, respectively, on February 28, 1955, with respect to 35 capsules of heroin (R. 1-3).

The government presented the testimony of a federal undercover narcotics agent that, in company with an addict, he went to petitioner's apartment on February 26, 1955, at about 7:15 p.m., where a purchase of the narcotics was arranged with petitioner and payment made; that petitioner left the apartment and returned about an hour later and delivered the narcotics to the agent in an unstamped envelope, without use of any order form; and that substantially similar events took place two days later, on February 28. Another federal agent testified to having watched petitioner leave and

return to his apartment on February 28, 1955, at the times stated by the first agent. Petitioner testified, *inter alia*, that he had been ill and had not left the apartment on February 26; that he had suspected the particular addict as an informer and had refused his request for narcotics; and that he had not been at his apartment on the evening of February 28, 1955.[1]

Upon trial by jury, petitioner was found guilty as charged (R. 4). A fine of $500 was imposed by Judge Youngdahl on each count, and suspended. Sentences of imprisonment for a term of one to five years were also imposed on each count, the sentences on the first three counts to run consecutively, and the sentences on the remaining three counts to run concurrently with those on the first three counts (R. 4-5). The total sentence was three to fifteen years.

On March 24, 1956, petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence, contending that the consecutive sentences imposed under the first three counts, resulting in a cumulative sentence of from three to fifteen years, were in excess of the maximum authorized by law (R. 5-8). The motion was denied (R. 8). The Court of Appeals affirmed, Circuit Judges Bazelon and Fahy concurring on the authority of *Blockburger* v. *United States*, 284 U.S. 299, but expressing doubt whether they would reach that result if they were not bound by that decision.

SUMMARY OF ARGUMENT

Petitioner does not dispute that the decision in *Blockburger* v. *United States*, 284 U.S. 299, in 1932, permits the imposition of consecutive sentences for

[1] The testimony appears in the certified record of the official court reporter, lodged with the Clerk of this Court.

violation of three different provisions relating to narcotics, even if, in a particular factual situation, the three offenses were committed by one act of sale. In that and other cases, this Court has hitherto found it appropriate, for purposes of both statutory interpretation and double jeopardy, to determine what the offenses are as defined by Congress in general, and not by examining into the manner in which the offenses were committed in the particular case. If the consequence of the offenses being held separate is deemed too harsh, the Court said "* * * the remedy must be afforded by act of Congress * * * ." 284 U.S. at 305. Thus, although suggesting that Congress might see fit to change the statutes, the Court has left the question of whether multiple sentences should be imposed, where the offenses are closely related but still separate, for consideration by the sentencing judge in the light of all the facts. That, we submit, is where the matter should rest unless Congress dictates otherwise.

I

A. Petitioner's argument that *Blockburger* was incorrectly decided as a matter of statutory interpretation is unsound. The three offenses here involved came into the law at different times and serve different purposes, even if their general and ultimate aim was to prohibit dealings in narcotics through unrecognized channels. Almost any criminal statute has one ultimate aim as, for example, the statute relating to counterfeiting has the aim of preventing the circulation of counterfeit money. This does not mean that Congress could not properly create and treat as separate offenses

the making of counterfeit money, the possession of counterfeit money, and the passing of such money. The fact that those three offenses may occur at the same time and place is one which the sentencing judges should and do consider in exercising their discretion in imposing sentence, but we do not think it can be said that the three offenses are one and the same.

The situation is similar in this case. The Export-Import Act, passed in 1909, aims at preventing the initial step of importation of opium and dealing with unlawfully imported opium. It covers, not only sale as such, but transporting, concealing and facilitating the transportation of imported opium products. In 1914, Congress felt that this import legislation needed supplementing by federal internal revenue regulation. It therefore provided in the Harrison Act of 1914 for an annual tax and the use of a written order form. This statute serves the direct purpose of channelizing the traffic into licensed hands by forbidding unlicensed sales. It is roughly equivalent to a provision requiring the filing of an income tax return, even if a tax is not due in a particular year. Then, in 1919, Congress passed the stamp tax requirement, which imposes a tax directly on the narcotics and is the direct means of collecting revenue. It applies, not only to sales, but to purchases as well. Thus, the immediate objectives of the three statutes are all different. The fact that these three purposes may, in a particular case, be violated by one act of sale does not make the offenses unitary. Whatever influence the fact that there is only one sale should have upon the exercise of the sentencing judge's discretion, the three offenses as such are still separate and different.

Although the Court in *Blockburger* did not undertake any extensive discussion of the legislative history, the decision in *Nigro* v. *United States*, 276 U.S. 332, decided shortly before and cited in *Blockburger*, reveals full awareness of the legislative history and the differing purposes of the separate requirements of the narcotics laws.

B. Amendments to the narcotics laws subsequent to the *Blockburger* decision have merely increased the penalties, and have not changed the character of the offenses proscribed. The fact that Congress prescribed a heavier sentence for subsequent offenders certainly does not show that it considered that the initial offense would be unitary, no matter how many statutes were violated. The character of the offenses as separate depends on *what* is proscribed; the increased penalty depends on *when* the offenses are committed, *i.e.*, whether they are committed subsequent to a prior conviction or convictions. Even if the first conviction resulted from six clearly separate offenses—*e.g.*, six widely separated acts of sale—it would be a first conviction for recidivist penalty purposes. Hence, the provision for heavier penalties for subsequent violators—persons who had previously been punished or given an opportunity to reform—does not bear on the separate character of the offenses as such.

The Boggs Act of 1951, applicable here, and the subsequently enacted Narcotic Control Law of 1956 were both directed at increasing *minimum* sentences, not at mitigating any possible harsh results from multiple offenses. To the extent that Congress separately amended the penalties of both the import act and the revenue code (and in the 1956 Act differentiated the

penalties for internal revenue act offenses) it gave tacit recognition to the separateness of the offenses. Various language changes and statements in the reports also support the view that Congress treated each offense as separate. Thus, if the subsequent legislative history has any impact on the *Blockburger* decision it must be read as a reaffirmation of that ruling.

II

In arguing that, if the offenses are not separate as a matter of statutory construction, they must be held unitary to avoid violation of the constitutional prohibition against double jeopardy, petitioner is admittedly asking this Court to reconsider a long line of its decisions to the effect that there is no violation of the double jeopardy clause if the offenses as such are different, no matter how closely related in actual fact. Although petitioner couches his suggestion in terms of asking this Court to reconsider the accepted test for measuring identity of offenses, he is really asking for a more fundamental change in the approach to the problem.

Blockburger and other decisions of this Court in this field, whether phrased in terms of statutory interpretation or of double jeopardy, rest on the concept that issues of multiplicity of offenses are to be determined from the *elements* of the *offenses* as defined in the statute, without relation to the particular circumstances under which the particular crime was committed. If, for example, possession and sale of a forbidden article can in *any* circumstances be factually different offenses—and of course they can be—the Court has not considered it of significance (in the context of double jeopardy) whether, in a particular case, the proof of possession is co-extensive with proof of the act of sale. None of

the later decisions of this Court, which have interpreted the unit of the offense under particular statutes more broadly than was done in prior decisions under other statutes, has departed from this principle—that the *offenses as defined* by Congress are controlling, and not the particular circumstances under which the offenses happened to be committed. The latter factors are for consideration by the sentencing judge alone.

As to retrial after acquittal, this Court, in *Sealfon* v. *United States*, 332 U.S. 575, has in practical effect made the factual closeness of particular offenses a significant factor, not by upsetting long established rules of double jeopardy (which indeed that decision reaffirmed) but by a liberalized interpretation of principles of *res judicata*. The reason that there has been no equivalent modification with relation to consecutive sentences for related offenses, where the offenses are committed by one act, stems (among other reasons) from the fact that the matter is best handled by the sentencing judge. Although it is accepted and sound practice for the government to charge a single transaction in multiple counts, in the absence of aggravating circumstances consecutive sentences are not generally imposed for one act. Since the cases where such sentences are imposed are the ones most frequently litigated, the problem tends, at the appellate level, to appear more acute than it actually is. Even where sentencing judges have imposed consecutive sentences despite a close relationship of counts to each other, it will often be found that the total sentence can be sustained on the basis of clearly separate transactions. For example, here petitioner made two sales on different days, so that two of his three consecutive sentences are valid on any theory. As to the third, the evidence

indicates that in each instance petitioner not only made a sale, but actually transported the narcotics as well.

As we have said, *Blockburger* and the other decisions of this Court, in effect, left it to the sentencing judge to decide whether, on the particular facts, multiple sentences should be imposed for closely related offenses arising out of one or more closely related acts. Petitioner's entire argument, upon analysis, resolves itself into a contention that, on the particular facts of his case, the sentence is unfair. That is not, we submit, a basis for overturning long established principles of statutory interpretation in the field of criminal law, or for construing anew the constitutional doctrine of double jeopardy.

ARGUMENT

Introduction

As the court below has held, and as petitioner admits, the decision of this Court in *Blockburger* v. *United States*, 284 U.S. 299, permits the imposition of consecutive sentences on counts 1, 2 and 3, even assuming *arguendo* that all three sentences are founded on one act of sale. In *Blockburger*, the Court found that the provisions of the Harrison Narcotic Act (38 Stat. 785, as amended) making unlawful, respectively, the sale of drugs not in or from the stamped package, and sale not in pursuance of a written order, created two separate and distinct offenses punishable by separate penalties —and this in spite of the fact that there was but one sale—since each offense required proof of a different element. The Court said (284 U.S. at 305): "The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress.

not by judicial legislation under the guise of construction."

Although, as we show *infra*, pp. 27-37, Congress has not altered the separate nature of the offenses, petitioner now asks this Court to overrule *Blockburger*,[2] first as a matter of legislative interpretation, and, alternatively, on the basis of the constitutional prohibition against double jeopardy. But we do not find that *Blockburger* was written without awareness of the legislative history or purposes of the statutes involved (see *infra*, pp. 20-23), and we are unable to see any basis for overruling *Blockburger* in the legislative history of the narcotics statutes, either prior or subsequent to that decision. As for petitioner's contentions with respect to double jeopardy, he is admittedly asking this Court to overrule a long line of decisions, antedating *Blockburger* and reaffirmed since, many of which were written by or participated in by the most eminent members of the Court. Those holdings are all to the effect that there is no double jeopardy if the offenses as defined by Congress are separate, regardless of the origin of those separate offenses in a single act or transaction or a series of closely related acts or transactions. In effect, the decisions have left it to the sentencing judge to decide whether consecutive sentences should be imposed where, under the particular facts of a particular case, multiple offenses are committed by one act or series of acts. That is where, we submit, the issue should rest unless and until Congress alters the legislation.

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[2] The opinion in *Blockburger*, decided in 1932, was written for a unanimous Court by Justice Sutherland. Participating in the decision were Chief Justice Hughes and Justices Holmes, Van Devanter, McReynolds, Brandeis, Butler, Stone and Roberts.

I

The Three Narcotics Offenses Are Separate Since the Three Prohibitions Originated in Separate Enactments, in the Years 1909, 1914, and 1919 Respectively, and the Elements are Different, Each Imposing Separate Kinds of Duties Having Different Purposes.

In *Blockburger* v. *United States*, 284 U.S. 299, the defendant was found guilty of a sale of narcotics that violated both the prohibition against sale not in or from the stamped package and the prohibition against sale without the prescribed written order form—two provisions also involved in the instant case. Consecutive sentences of five years' imprisonment and fines of $2,000 were imposed upon each count (284 U.S. at 301), and Blockburger contended, substantially as petitioner contends here, that the violations charged in the several counts "constitute but one offense for which only a single penalty lawfully may be imposed" (*ibid.*). This Court rejected the contention, holding instead (284 U.S. at 304):

> The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See *Alston* v. *United States*, 274 U.S. 289, 294; *Nigro* v. *United States*, 276 U.S. 332, 341, 345, 351.

Petitioner attacks this holding, as a matter of legislative interpretation, arguing that *Blockburger* did not consider the prior legislative history of the statute which shows that its basic aim was to suppress the narcotics traffic. He argues that, since that was the evil at which Congress was aiming, one act of sale should

also have been held, as a matter of Congressional intent, to be only one evil and therefore only one offense.

The argument as to the Court's lack of consideration of the prior legislative history is as we show *infra*, pp. 20-22, answered by the Court's reference in *Blockburger* to *Nigro* v. *United States*, 276 U.S. 332, in which seven of the same members of the Court had participated. The briefs and decisions in *Nigro* both contain extensive legislative history (276 U.S. at 335, 340-344) and detailed analysis of the differentiated objectives of the provisions (276 U.S. at 341, 345, 351). Accordingly, it cannot be assumed, as petitioner implies, that the then Court—25 years closer to the basic legislation than we are today—was unaware of the separate origins and purposes of the respective enactments or was led into error by the revenue basis on which federal jurisdiction of the two provisions was founded.

More fundamentally, however, we are unable to find much strength in the argument which is rested on the fact that the two statutes involved in *Blockburger*, although clothed in the form of revenue measures, were both aimed at outlawing sales of narcotics except through recognized channels. Almost any criminal statute dealing with a particular field has such an essentially "unitary" purpose, but that does not prevent separate offenses from being enacted by Congress. The prohibition statute involved in *Albrecht* v. *United States*, 273 U.S. 1 (an opinion by Justice Brandeis, holding possession and sale separate offenses) was aimed at preventing the sales of liquor except through recognized channels in a field in which Congress had complete authority regardless of any revenue founda-

tion. The bribery statute involved in *Burton* v. *United States*, 202 U.S. 344 (involving agreement to take a bribe, and bribery) was aimed at preventing the taking of bribes. The counterfeit statute involved in *United States* v. *Michener*, 331 U.S. 789 (making a plate for counterfeiting, and possessing the plate) was aimed at preventing the circulation of counterfeit; another area in which Congress has full power over the field. As those decisions show, this does not mean that Congress may or does impose only one punishment for all the various acts that can be done to defeat the single general Congressional purpose. Certainly, for example, Congress had the right to, and did, consider the making of counterfeit one evil, and the passing of counterfeit (whether by the maker or by someone else) a separate act and a separate evil punishable as a separate offense. The government is substantially and separately injured when each of its requirements directed toward enforcement of the desired end is violated. That, as we show below (*infra*, pp. 17-26), is the situation here.

Each of the statutes involved in this case was designed to serve a specific Congressional objective. And while, undoubtedly, an ultimate objective of each of those requirements was suppression of illegal traffic in narcotics, the flouting of any one of the prohibitions adopted by Congress to reach that ultimate goal is a separate evil and a separate injury. If, in making a sale of narcotics, the seller assaulted a government officer, the assault would clearly be a separate offense from the sale, although the purpose of the assault was only to effectuate the sale. The situation here is less dramatic but not different. To make a sale,

petitioner did at least three things which Congress has said he should not do. He thus committed three offenses against the government. Violation of one of the offenses did not give him an immunity to violate the other two.

The question relates to the offenses which Congress has defined, and not the origin of those offenses in any particular set of facts. When a legislature deals with two separate evils—such as the disorderly conduct and insulting a public official involved in *Gavieres* v. *United States*, 220 U.S. 338—it obviously is not thinking about the fact that in some particular case one person may commit both offenses by one act. Murder and rape can be committed by one act, but a legislature would not normally consider that possibility in fixing the penalty for each crime. That is true of more closely related evils such as the making of a counterfeiting plate and the possession of the plate involved in *United States* v. *Michener*, 331 U.S. 789. Possession of counterfeiting equipment is an evil and the making of counterfeit is another evil—whether they happen to occur at the same time, or at different times, and whether they are done by one person or by two separately. A legislature defines offenses and imposes penalties generally. As to the *unit* of the crime—*e.g.*, whether transportation as such or transportation of each woman for immoral purposes is the punishable act (see *Bell* v. *United States*, 349 U.S. 81)—the intent of the legislature may often be deduced from the language of the statute or its particular legislative history. But where Congress has defined different offenses to serve different purposes, there is seldom likely to be any specific indication of what Congress intended with respect to a particular

factual variant where the two offenses happen to be committed by one act.[3] Thus, in considering the offenses *as defined by Congress*, it normally serves no useful purpose to stress the fact that, in a particular case, several offenses may be committed by one act. The intent of Congress unquestionably is that *all* its requirements be obeyed, and therefore it establishes separate prohibitions and separate penalties. When the offenses happen to arise out of the same set of facts the problem is not one of statutory interpretations or of redefining the offense. The problem is one of sentencing; only the sentencing judge is in a position to apply the punishments Congress has prescribed to a particular fact situation and a particular defendant in a manner which will best promote the ends of justice.

A. *The three narcotics provisions have distinct functions in the enforcement of the ultimate end of suppressing the illegal traffic in narcotics.*

The three provisions here violated include not only the two involved in *Blockburger* v. *United States*, *supra*, but a third, further differentiated in that it was not a revenue provision but a part of the statute controlling imports. The three provisions appeared at periods separated from one another by a half-decade in each case—in 1909, the prohibition against imports (35 Stat. 614); in 1914, the prohibition against dealings without the written order form of the person acquiring the narcotics; and in 1919, the prohibition against dealings

[3] As this Court noted in *Prince* v. *United States*, 352 U.S. 322, the legislative history of the bank robbery statute there involved was in many ways unique.

not in or from a stamped package.[4] Each serves a distinct purpose.

1. *The 1909 import statute.* The 1909 statute (35 Stat. 614), as originally enacted, embodied the basic aspects of the present statute. It prohibited importation and imposed a penalty of a $50 to $5,000 fine and/or imprisonment not exceeding two years for receiving, buying, selling, or in any manner facilitating the transportation, concealment, or sale of opium, knowing the importation to have been unlawful, and it stated the presumption that unexplained possession constituted sufficient evidence to authorize conviction.[5]

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[4] Petitioner (Pet. Br. 20) combines under a single heading—The Harrison Anti-Narcotic Act—the enactment of 1914, as to the unstamped package prohibition, and an enactment of 1919, imposing different duties thus providing occasion for correspondingly different offenses. Similarly, in the chart on page 22a of his brief, petitioner, while indicating that the import offense originated in a 1909 enactment, fails to stagger appropriately the 1914 and 1919 origins of the prohibitions, respectively, against dealings in unstamped packages and against dealings without written order forms, placing them together under the single caption "BASIC 1914 LEGISLATION" and making no reference to the 1919 enactment, despite references to other enactments of considerably less significance.

In his chronological review of the various enactments (Pet. Br. 20), petitioner again includes discussion of the stamp tax provision under the 1914 legislation, and makes no mention of the 1919 legislation which first created the prohibition against dealings in unstamped packages.

[5] The 1909 statute was supplemented by the Act of January 17, 1914 (38 Stat. 275), adding presumptions as to the date of importation, and penalties and presumptions with reference to presence of the drugs on vessels and railroad cars, and transportation of smoking opium.

2. *The 1914 written order form requirement.* The separate offense with respect to sale without order forms appeared with the enactment of the so-called Harrison Act in December 1914 (38 Stat. 785). Every person producing, importing, dealing in, selling, or giving opium or coca drugs was required to register with the collector of internal revenue and pay an annual tax of $1. Section 2 of this enactment established the requirement of an order form, as prescribed by the government, and a penalty for failure to employ the form. All laws relating to collection of internal-revenue taxes were made applicable to the special tax imposed upon registered dispensers of the drugs (Sec. 7; 38 Stat. 789). Possession by "any person not registered" who had not paid the special registration tax was also declared unlawful (Sec. 8; 38 Stat. 789).

Penalties of imprisonment not to exceed 5 years and/or a fine of not more than $2,000 were imposed for violations of "this Act." Specific provision was made that nothing in the Act should "impair, alter, amend, or repeal any of the provisions of" the 1909 Act prohibiting importation and use of opium (Secs. 9, 12; 38 Stat. 789-790).

The enactment of the 1914 legislation had been preceded by a vigorous message from the President (House Doc. No. 33, 63d Cong., 1st Sess., April 21, 1913), pointing out that, while other nations had supplemented the international prohibitions against the drug traffic with domestic legislation, the United States,

since the 1909 opium-exclusion act, had taken no further definite action for "Federal control" of the drug traffic "in the United States."[6]

The report of the House Ways and Means Committee (H. Rep. No. 23, 63d Cong., 1st Sess. to accompany H. R. 6282, June 24, 1913) reviewed the excessive importation of narcotic drugs and, adverting to the 1909 opium-exclusion statute, stated the need of additional legislation to secure more certain federal control of the importation "and interstate traffic" in narcotics (p. 3). The report, like the statute itself, specifically stated that "nothing in this act is to interfere with the pure-food law and the opium-exclusion act" (p. 4).[7]

3. *The 1919 stamp tax requirement.* By the Act of February 24, 1919 (40 Stat. 1130), Congress provided for a stamp tax of one cent per ounce and made unlawful the purchase, sale, dispensing, or distributing of the narcotic drugs unless in or from the stamped package.[8] The occasion for the additional tax was the decision in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, which limited the effectiveness of the 1914 Act by holding that Section 8, punishing the possession of narcotics by "any person not registered", did not apply to

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[6] A bill regulating narcotic drugs within the United States and imposing a tax had been urged upon Congress since March 1910 as a necessary step in the participation of the United States in the international drug agreements (Sen. Doc. No. 157, 63d Cong., 1st Sess., Aug. 9, 1913, p. 87).

[7] The report of the Senate Committee on Finance (S. Rep. No. 258, 63d Cong., 2d Sess., February 18, 1914) adopted the House report, *supra*, in its entirety (pp. 3-4).

[8] The special annual tax, in addition, was raised to a maximum of $24.

a person who was not in the class required to register. Congress in 1919 imposed the new and further duty to pay a tax evidenced by a stamp on the drugs themselves and, in enforcement thereof, stated the presumption that possession of an unstamped package indicated an offense under this provision (H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, p. 36; S. Rep. No. 617, 65th Cong., 3d Sess., December 6, 1918, p. 56).

In *Nigro* v. *United States*, 276 U. S. 332, which came before this Court after the 1919 amendment, the defendant had been indicted for selling morphine without a written order form. The argument was made that the penalties for selling without a written form should be limited to persons required to register (as the *Jin Fuey Moy* decision had held with respect to the penalty for possession). After noting the argument that "it would be superfluous to include persons selling opium who are not registered because they are denounced as criminals by the first section for selling without registration", this Court, in an opinion by Chief Justice Taft, said, "That is no reason why they may not be included under a second reasonable restriction enforceable by punishment." (276 U. S. at 344) And it added (276 U. S. at 345):

> It would seem to be admissible and wise, in a law seeking to impose taxes for the sale of an elusive subject, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, *any departure from the steps enjoined may be punished*, and added penalties may be fixed for successive omissions, but all for

the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax. [Emphasis added.]

The Court further noted that, at the time of its decision, the stamp tax had been imposed (276 U. S. at 346-347). It stated:

> By the amendment of § 1 [in 1919], much higher occupation taxes were imposed, and they vary in amount for producers and manufacturers and for wholesale and retail dealers and for physicians. More than that, an excise tax of one cent per ounce of the drug is imposed and payment thereof is to be evidenced by stamps attached to the bottle or box containing the drug, and the sale of the drug from anything but a stamped bottle or container is punishable. The provision for order forms is thus useful under the amended section, and there is therefore still reason for holding the provisions of § 2 to apply to all persons so as to be helpful in promoting detection of evasion from the added tax imposed under the new § 1. *The two tax provisions of that section would be much less effective if a purchaser of drugs from an unregistered dealer is not required to furnish an order form.* The purchaser may be himself one who should register, but has not done so, or he may be dealing in and selling the drug on which the stamp tax has not been paid, and it is just as important that sales by an unregistered dealer should be punished, unless made on a prescribed form, as that sales by registered dealers should be subject to penalty. [Emphasis added.]

As we have noted, in the face of this decision (rendered very shortly before *Blockburger*), it cannot be said that the Court in *Blockburger* was unaware of the legislative history of the provisions of the statutes before it. And as the *Nigro* decision points out, each of the statutes involved in *Blockburger* serves a different purpose in enforcement of the measures regulating narcotics. As for petitioner's argument that there is no revenue purpose to the legislation, it may be noted that, as found in *Nigro* v. *United States*, 276 U. S. at 339, revenue does result from the legislation. The statute actually produced more than two million dollars in revenue during the year 1950, preceding the enactment of the Boggs Act.[9] The fact that more revenue might be obtained if transactions in narcotics were not limited does not alter the fact that the requirements serve a legitimate function. In measures which have a purely tax function without any other social purpose, the government normally requires persons to register in some form as well as to pay the tax. See *United States* v. *Kahriger*, 345 U. S. 22, 31. Obviously, for example, the government has an interest in requiring that persons who should file income tax returns do so, whether or not a tax must be paid in any particular year. Hence, failure to file a return and evasion of taxes are two

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[9] Report of the United States Treasury Department, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, for the year ended December, 1950, p. 7:

Customs duties on opium released for civilian uses ..	$865,820.87
Customs duties on coca leaves imported	12,427.75
Internal Revenue collections—registrations, tax stamps, order forms on opium, coca leaves, and marihuana	824,555.02
Paid fines and compromises	46,076.09
Value of vehicles forfeited	329,173.76
Total	$2,078,053.49

separate injuries to the government, two separate offenses (cf. 26 U.S.C., Supp. V, 7201; 7203)—regardless of whether, in a particular case, failure to file may also be a means of tax evasion. And this remains true whether the ultimate object of the legislation is revenue or regulation.

In sum, each of the statutes here involved serves a different function. The 1909 Act aims at preventing the initial step of importation of opium and dealing with imported opium. It covers, not only sale as such, but transporting, concealing and facilitating the transportation of imported opium products. The written order form of the Harrison Narcotic Act is aimed at channeling domestic trade into proper channels by requiring that no narcotics be sold except pursuant to the prescribed order form. It is the means by which legally imported narcotics can be traced from importation to ultimate use, even by a physician whose use of an abnormal number of forms may serve as a reason for investigation. See *Direct Sales Co.* v. *United States*, 319 U. S. 703. The stamp tax requirement is a means of collecting revenue, and applies, not only to sale, but to purchase and distribution without the required stamp. It is the most immediate means of identifying illicit narcotics; the absence of a stamp showing the illegal character without the necessity of checking on order forms. The fact that all these three purposes have, in any particular case, been vitiated by one act of sale does not transform the separate purpose of the three separate pieces of legislation into one unitary objective. Whatever the consequences of the fact that there is one sale, the three offenses are different, not only in their elements, but in the immediate purpose of the three prohibitions.

In determining the separate character of the *offenses* as such, the issue is always whether the acts which Congress proscribed are—in their general character—separate. Whether the test employed is that of *Blockburger* (does each prohibition involve elements not present in the other?) or the test of whether each prohibition is directed at a separate evil, the result is the same. Dealing in unlawfully imported narcotics, failure to comply with the registration requirement which is designed to keep the traffic in proper channels, and failure to pay the tax that should have been paid on the narcotics themselves, have different elements and reach separate evils.

One who conceals a shipment of narcotics creates a constant threat that the narcotics will eventually be sold. The concealment creates problems for the federal agents tracing the shipment, distracting their energies and often exposing them to great dangers. If the threat of a separate punishment deters the possessor at least from passing the narcotic drugs on and thereby perhaps initiating another addict, there has been averted a further and distinct injury to the government. Further, if the threat of a separate offense and separate punishment deters a trafficker from dealing in any but stamped goods—albeit they are stolen—he poses one less injury to the body politic in that his loot may more easily be traced.[9a]

Congress may seek to avert a single general evil by a number of duties imposed upon citizens, and the violation of each such duty injures the United States in a

[9a] This is not an uncommon situation. In 1950 Congress amended the definition of contraband in 49 U.S.C. 781(b) to include narcotics acquired by theft, robbery, or burglary. 64 Stat. 427.

different respect. To adduce the singleness of the ultimate broad general purpose—eliminating the narcotics trade—as a basis for insisting that all ways of combating that evil must be cumulated as one offense is not only a novel suggestion in the field of criminal law, but an unworkable one if carried to its logical conclusion. It would almost permit the single and unprecise offense of "violation of laws" or, at least, "violation of narcotics laws".

Petitioner's argument, in all its variations, that "the purpose of Congress is amply served by a single conviction and sentence" (Pet. Br. 50), is answered by the ruling in *Blockburger* that this is a matter for Congressional determination. Congress chose to create these separate offenses before *Blockburger* and, as we shall show, to continue them thereafter. The offenses as such apply to many situations beyond a single act of sale and their nature as offenses does not change because, in a particular case, they are committed by one act. Whatever the influence the fact that, in a particular factual situation, three offenses are committed by one act should have upon the exercise of the sentencing judge's discretion, it does not alter the fact that Congress has defined three separate crimes, each requiring proof of a different element, and each serving a different function.[10]

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[10] Petitioner revives an argument (Pet. Br. 75) raised just prior to the *Blockburger* case, in *Ballerini* v. *Aderholt*, 44 F. 2d 352 (C.A. 5), *i.e.*, that because the respective statutes state a presumption of guilt from unexplained possession of the narcotics the offenses cannot be considered different. In *Blockburger*, this Court specifically stated (284 U. S. at 304), "The case of *Ballerini* v. *Aderholt*, * * * is disapproved." See *Corollo* v. *Dutton*, 63 F. 2d 7, 8 (C.A. 5), quoted with approval in *McDade* v. *United States*, 206 F. 2d 494, 495 (C.A. 6): "* * * This subdivision does not define the sub-

B. *Amendments subsequent to the* Blockburger *decision have merely increased the penalties for each offense and have not changed the character of the offenses proscribed.*

As we read petitioner's brief, he is not arguing that, if *Blockburger* was correct at the time it was decided, the nature of the proscribed acts as establishing separate offenses has been changed by the subsequent legislation, which did not change the character of the offenses but merely increased and made distinctions as to penalties. Rather, petitioner seeks to find support in the later legislation for his view that *Blockburger* was incorrectly decided as a matter of legislative interpretation. We find nothing in the later legislation that casts doubt on the validity of the *Blockburger* holding that the offenses as such are separate. Despite the explicit invitation of this Court in *Blockburger* to Congress to reconsider the statute if it found the imposition of consecutive sentences too harsh (see pp. 11-12, *supra*), Congress directed its attention only to the necessity for *increasing* penalties. And in doing so, there seems to have been no reference to the *Blockburger* decision, although we think there is tacit indication that Con-

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stantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, prima facie, of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same. An examination of them shows that quite the contrary is true. The fact essential in proof of the second count is the purchase of morphine not in or from the original stamped package. The essential fact in the third count is the sale of morphine not in pursuance of a written order. The essential fact in the fourth count is knowingly receiving and concealing morphine which had been unlawfully imported into the United States."

gress was aware that each of the offenses was different. This becomes clear from a more detailed consideration of the subsequent amendments.

1. *The 1937 legislation increasing penalties in the case of second and subsequent offenders.*—By the Act of August 12, 1937 (50 Stat. 627), Congress provided that "a person who, after having been convicted of selling, importing, or exporting, or conspiring" to do so, did so again, should "upon conviction of such second offense" be fined not more than $5,000 and/or imprisoned for not more than ten years. Upon conviction of a "third offense, or any offense subsequent thereto", a fine of not more than $10,000 was provided, and/or imprisonment of not more than 20 years.

The committee reports, after noting the differing fines and sentences provided under the separate Harrison Act and the Narcotic Drugs Import and Export Act, stated in identical language (H. Rep. No. 1122; S. Rep. No. 88); 75th Cong., 1st Sess., p. 3, emphasis added):

> The size of the penalty depends in both instances upon *the nature of the offense*, but the fact of prior conviction is not made an element in either [of the prior acts].

Since, under the terms of the 1937 statute, a person did not become a second offender until "convicted" of an earlier offense, a person who committed the several offenses in a single transaction did not thereby become a second or third offender. The status of second or third offender created by this enactment is a concept wholly apart from the definitions of the *types* or *nature* of offenses. The character of the offense as separate depends on *what* was prohibited; the increased penalty depends on *when* the offenses were committed, *i.e.*,

whether they were committed after a prior conviction or convictions. Since the theory of increased penalties for subsequent offenders implies that there should be a motive and opportunity for reform after conviction, it is reasonable to treat the entire first conviction as one conviction for these second offender purposes. See *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, interpreting the phrase convicted "more than once" as used in the Immigration Act of 1917 in this fashion. But it would be stretching that concept far beyond its purpose to read into it a legislative overruling of the *Blockburger* rule. The first conviction in a particular case might involve a situation where a defendant purchased a large quantity of narcotics one day, hid them for several days, and then made a number of separate sales on different days. We do not think that petitioner would contend that this was only one offense for the purposes of sentencing on that original conviction, even if it was a first conviction for the purposes of the second offender statute.

2. *The Boggs Act of 1951.*—The first section of the Act known as the Boggs Act (65 Stat. 767) separately amended Section 2(c) of the Narcotic Drugs Import and Export Act. It made mandatory, for the first time, a *minimum* prison sentence of two years for the first offender, five years for the second offender, and ten years for the third offender, and also a fine of not to exceed $2,000 for all offenders. It set the maximum terms for first offenders at five years, for second offenders at ten years, and for third offenders at 20 years.

Section 2 of the Act *separately* amended Section 2557(b)(1) of the Internal Revenue Code, placing in

that section the mandatory minimums and the scale of maximums above set forth.[11]

a. The Boggs Act (65 Stat. 767) did not expressly refer to—much less overrule—the long-established *Blockburger* holding as to separate offenses. Its entire structure left all definitions and separations of offenses substantially as before. Indeed, the *separate* amendment of both the Import Act and the revenue code is in itself a significant, even if tacit, recognition of the separateness of the substantive offenses.

Moreover, while the Harrison Act, at the time of *Blockburger*, imposed its penalty upon a person who violated or failed to comply with *the Act*,[12] the Boggs Act imposes punishment upon one who "commits *an* offense" described in Part I (emphasis added). While we find no indication of conscious purpose in this change, we think that it is a further indirect indication of the Congressional recognition and acceptance of the *Blockburger* rule as to separate offenses. The added language concerning second offenders also speaks in singular, not plural, terms—"For a second offense, the offender shall be fined * * * and imprisoned * * *. For a third or subsequent offense, the offender shall be fined * * * and imprisoned * * *." Moreover, the statute

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[11] For the prior scales of *maximum* sentences and fines and their interrelationships under the Narcotic Drugs Import and Export Act, the Internal Revenue Code, and the provisions concerning second and subsequent offenses of selling, importing, exporting, and conspiring to do so, under the Act of August 12, 1937, as amended, see the comparative treatment at pp. 6-9, H. Rep. No. 635, 82d Cong., 1st Sess.

[12] This language was a ground urged in *Blockburger* for the view that the punishment was imposed upon the single act of violating rather than upon the several types of offense embodied in a single act. (284 U. S. at 305; Brief for the Petitioner in No. 374, O.T. 1931, pp. 14-15.)

specifies that a prior offense is a conviction for any one of specifically enumerated statutes, again indicating an awareness of the separate nature of the prohibitions.

b. The legislative history contains similar tacit indications that, although Congress was not specifically directing its attention to the problem, it assumed that each of the offenses was separate. The House report (H. Rep. No. 635, 82d Cong., 1st Sess.) summarized the then state of the law as providing criminal penalties for anyone who "imports" narcotics "or" who receives, conceals, buys, sells, "or" facilitates transportation, concealment, "or" sale after importation, and stated, "*Other* criminal penalties are provided for violations of the internal revenue laws relating to the taxes upon opium * * * and the occupational taxes upon distributors of narcotics and marihuana" (pp. 1-2; emphasis added).

The report characterized the bill as amending the narcotics law "and" internal revenue laws to provide greater uniformity of penalties for "serious" violations of "those" laws, by fixing maximum fines for "all" such offenses (p. 2).[13] Noteworthy also is the language (H. Rep., *supra*, p. 2) stating that the amendment of Section 2557(b)(1) of the Internal Revenue

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[13] The use in the House Report, p. 2, of language referring to the "first offense" in the singular in setting forth the maximum and minimum terms for that offense (*e.g.*, "maximum prison terms of from 2 to 5 years for the first offense") is patently not the same as if the reference had been to a first "act" or "transaction," nor is it ground for implying a new provision that each first *act*, possibly entailing two or three separate offenses, was now to be limited in its consequences so that the aggregate maximum for several offenses was now to be *reduced* to the maximum for a single offense.

Code (forerunner of the instant Section 7237 (a)) was designed to make "uniform" the possible penalties—using the plural form "penalties"—for "the several offenses" coming within the scope of that section. Chairman Boggs specifically stated that the bill would provide the "same" penalties for violations of "both" the "tax laws and the Narcotic Drugs Import and Export Act" (97 Cong. Rec. 8196).

c. The purpose of the Boggs Act, stated over and over again throughout the hearings, in the reports, and in the debates, was to *increase* penalties, for first as well as second offenders.

Two sections of the House report were headed "D. INADEQUACY OF PENALTIES UNDER EXISTING LAW," and "E. ANTICIPATED EFFECT OF INCREASING MAXIMUM PENALTIES AND IMPOSING MINIMUM PENALTIES FOR NARCOTICS VIOLATIONS." The text bristled with such terms and phrases as "increased penalties", "severe penalties", "mandatory penalties", "severe sentences", "strong long sentences", "[w]e would like to see the risks enhanced in this dirty business", and the committee stated (p. 4):

> It appears urgent, therefore, that steps be taken to increase penalties even to the extent of removing some discretion from the Federal judiciary * * *.[14]

The Senate report, like the House report, was titled "INCREASED PENALTIES FOR NARCOTIC AND MARIHUANA LAW VIOLATIONS" (S. Rep. No. 1051, 82d Cong., 1st

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[14] The Act of August 12, 1937 (*supra*, pp. 27-28) had placed *maximums* for terms of sentence for repeated offenders, but had not set required *minimum* terms (pp. 6-9).

Sess., Oct. 1, 1951) and it incorporated and accepted the text of the House report.[15]

At more than 20 additional points during the presentation of the bill, on the day of its passage by the House, reference was made to the increase of penalties —*e.g.*, "more severe sentences"—as a purpose of the bill (97 Cong. Rec. 8197-8200, 8204-8209).

When the bill came before the Senate, on October 20, 1951, Committee Chairman O'Conor stated, "penalties for violations must be increased. * * * Unfortunately, some of the Federal courts in the past have not faced this situation realistically, and, as a result, short sentences have been imposed. The professional drug peddler responsible for the widespread use has been able to return to his illicit trade all too soon" (97 Cong. Rec. 13676). And Senator Kefauver inserted in the record a further statement, by the Commissioner of Narcotics, urging the "increased" penalties (97 Cong. Rec. 13676).

Congress was not concerned with the fact that it was theoretically possible for a first offender to receive a fairly long sentence. Its concern was with the fact that offenders, first or later, were not receiving what it regarded as a desirable *minimum* sentence. It was not directing any significant attention to maximum sen-

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[15] The House hearings (Hearings before Subcommittee of Committee on Ways and Means, 82d Cong., 1st Sess., on H.R. 3490, April 7, 14, and 17, 1951) likewise were replete with testimony as to the need for increased penalities (pp. 40-42, 44, 46-52, 55, 58, 65, 67, 69, 71, 75, 77-78, 95, 203, 210, 217.

The Senate hearings (Hearings before the Senate Special Committee to Investigate Organized Crime, 82d Cong., 1st Sess., May 29, June 7, 12, 26, and 27, 1951) elicited repeated recommendations of increased mandatory prison sentences (pp. 353, 417, 425, 430-431, 455).

tences, for the record before it disclosed no concern on the part of the judges with the existing maximums, and there already were in effect higher maximums for second and subsequent offenders (H. Rep. No. 635, 82d Cong., 1st Sess., pp. 8-9). The committee reports pointed out a history of an over-all average sentence of only 23.1 months—less than the two years which was to be enacted as a *minimum* for the first offender (H. Rep. No. 635, p. 3; S. Rep. No. 1051, p. 3 (82d Cong., 1st Sess.)). The enactment of a maximum of five years, in the face of such a history, was clearly attended by little concern or attention, much less any objection to the possibility that one committing three offenses might be subject to a possible accumulation of 15 years in *aggregate* sentences.

As aptly stated by Judge Maris in *United States* v. *Brisbane*, 239 F. 2d 859, 861 (C.A. 3):

> These minimums and maximums [provided under the Boggs Act] apply to each offense, however, and not, as the defendant contends, to the aggregate of the sentences imposed for all the offenses committed in connection with a single sale of narcotic drugs. For, as we have pointed out, the purpose of the Boggs Act was to increase the penalties and make them more stringent. It did not, and it was not intended to, modify the previously existing rule of law that the maximum sentence of imprisonment, or a lesser one, might be imposed with respect to each offense and might be ordered to be served consecutively.[16]

[16] The court accordingly sustained, as here, consecutive sentences on (1) receipt and concealment of illegally imported narcotics, (2) sale not pursuant to written order, and (3) sale not in the stamped package, on the basis of a sale of heroin.

See also *United States* v. *Lewis*, 227 F. 2d 524, 525 (C.A. 2), certiorari denied, 350 U.S. 974.

The first offender is not necessarily a novice in the drug traffic. As pointed out by Judge McAllister in *Everett* v. *United States*, 227 F. 2d 457, 459 (C.A. 6):[17]

> * * * One who is convicted of a first offense for selling or dealing in narcotics is, often, an old hand at the game who has previously escaped arrest and conviction because he knows all the tricks. The purpose of the statute was not to give consideration to first offenders of the Narcotics law but to increase sentences for second and third offenders.

3. *The 1956 legislation.*—Since the 1951 legislation which governed petitioner's offenses in 1955, the Congress has given further, extensive, attention to the narcotics laws, eventuating in the Narcotic Control Act of 1956. Again the emphasis is on *increases* in penalties. Far from concerning itself with the multiplication of penalties involved in prosecution for several offenses in a single transaction, Congress instead created additional offenses, increased penalties, and differentiated penalties of the former types of offenses. A sale or transfer without the written order form, and a dealing in violation of the Narcotic Drugs Import and Export Act, are now respectively subjected to a 5 to 20 year sentence for the first offense, thereby increasing both the minimum and maximum, as well as allowing a maximum fine of $20,000. For a second or subsequent offense, the penalty is increased to 10 to 40 years, and a

[17] There, as here, the defendant contended that the Boggs Act limited the aggregate term of the consecutive sentences, but there was not, as here, an additional contention based upon commission of the separate offenses in a single transaction.

maximum fine of $20,000 may be imposed. In the case of an order-form offense, if the offender attains the age of 18 before the offense, and deals with one not yet 18, a sentence range of 10 to 40 years is provided, and a fine up to $20,000 (70 Stat. 568, 570). At the same time, the penalties for an unstamped package offense have been increased, the first offender now being subject to a range of 2 to 10 years' imprisonment. Second offenses are subject to a 5 to 20 year range of imprisonment and subsequent offenses to a 10 to 40 year range. A fine of not more than $20,000 is permitted as to each group of offenders. (70 Stat. 568) A difference in treatment of the various offenses also appears, in that suspension of sentence or probation is still permitted as to a first unstamped package offense, but not so in the case of a first offense as to the written order form or as to Section 2(c) of the Narcotic Drugs Import and Export Act. New offenses are created, including a heavily penalized offense of sale of heroin to juveniles (70 Stat. 571).

What is significant in these changes, for the problem in this case, is that the Congress has confirmed the separateness of the offenses of which petitioner was convicted by enacting a difference in the penalties, retaining the same separate definition and the same separate statutory provisions which commenced with separate enactment of the three offenses in the years 1909, 1914, and 1919, respectively, and which was virtually the statutory form passed upon, and held to create separate offenses, in *Blockburger*.

The Congressional explanation of the 1956 differentiation in penalties is illuminating. In H. Rep. No. 2388, 84th Cong., 2d Sess., p. 2, the order-form offense

and the offense against the Narcotic Drugs Import and Export Act are discussed as offenses of the "trafficker" while the stamped-package offense is treated as that of the "possessor." This emphasizes the point we have previously made that each of the three statutes—each of the offenses as such—serves a different purpose and is different in character, whatever the factual origin of the offenses in a particular case.

In short, the amendments to the narcotics laws since *Blockburger*, which increased the penalties, did not effect any changes in the nature of the prohibitions and offenses, which, as we have shown, are different in purpose and character. All of petitioner's arguments based on the later legislation deal really, not with the nature of the offenses as such, but with their origin in a single act of sale in a particular case. Thus, petitioner stresses the fact that it is possible for a first offender to receive more than the minimum for a second offender if the act is charged in three counts. But if the first offender really did six separate acts—made six separate sales for example—there would be nothing incongruous in the fact that he was subject to a much more severe penalty than if he performed only one act. And this despite the fact that, for recidivist purposes, all six offenses would be a first conviction. As we have pointed out, any attempt to try to lump together the three separate offenses here involved as creating only one offense would result in needless confusion, and run counter to the whole Congressional treatment of the narcotics problem.

II

There Is No Double Jeopardy If the Offenses Are Different. The Relationship Among Closely Related Offenses Has Properly Been Left for Consideration by the Sentencing Judge.

Petitioner argues that, if his offenses are not held to be one as a matter of statutory construction, they must be held one in order to avoid violation of the constitutional prohibition against double jeopardy. In so doing, he is admittedly asking this Court to reconsider a long line of cases which have held or assumed that the double jeopardy clause is not violated by multiple punishment,[18] or indeed by a second trial, if the two offenses as *offenses* are different, regardless of whether they arose out of the same act or closely related acts and were directed at closely connected evils. *Carter* v. *McClaughry*, 183 U.S. 365, 395 (conspiring to commit an offense, and committing the substantive offense); *Burton* v. *United States*, 202 U.S. 344, 381 (agreeing to receive proscribed compensation, and receiving such compensation); *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (possession of liquor, and sale thereof); *Morgan* v. *Devine*, 237 U.S. 632 (breaking into a post office, and committing larceny therein); *Diaz* v. *United States*, 223 U.S. 442, 448-449 (homicide, and assault before the death); *King* v. *United States*, 280 U.S. 521 (selling morphine not in or from unstamped package, and shipping the morphine in interstate commerce); *United States* v. *Adams*, 281 U.S. 202, 204-205 (making a false entry in the books of a bank showing a credit, and making a false entry in a report of the condition

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[18] We do not dispute petitioner's position (Pet. Br. 54-60) that multiple punishment for the *same* offense after a single trial would be a violation of double jeopardy.

of the bank showing the same credit); *Korematsu* v. *United States*, 323 U.S. 214, 222 (disobedience of any one order of the various orders constituting separate steps "in a complete evacuation program"); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (conspiring to commit an offense, and committing the offense); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (conspiracy in restraint of trade, and conspiracy to monopolize, under Sections 1 and 2 of the Sherman Act); *United States* v. *Michener*, 331 U.S. 789 (causing a plate adapted for counterfeiting to be made, and possession of that plate); *United States* v. *Bayer*, 331 U.S. 532 (conspiracy to deprive the government of service of an officer, and the substantive offense); and *Pereira* v. *United States*, 347 U.S. 1 (violation of the mail fraud statute, violation of the National Stolen Property Act, and conspiracy to violate the two acts).[19]

Petitioner couches his suggestion for reconsideration as a request to this Court to reconsider the test for determining the issue of identity of offenses. He suggests that the Court abandon the test enunciated in *Blockburger* v. *United States*, 284 U.S. 299, which stems from *Rex* v. *Vandercomb*, 2 Leach C.C. 708, 709 (1796)[20] and which was reiterated in *Morey* v. *Commonwealth*, 108 Mass. 433 (1867),[21] cited in *Blockburger*. As we have pointed out (*supra*, p. 24), this

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[19] The Court noted the separability of the two substantive offenses, although the sentences thereon were concurrent (see Brief for the United States, No. 50, O.T. 1953).

[20] In that case, it was held that acquittal of breaking and entering and stealing was not a bar to prosecution for breaking and entering with intent to steal.

[21] The court there held that lewd cohabitation and adultery were separate offenses.

test is that offenses are different if each involves an element which the other does not. Petitioner suggests, as in his statutory argument, that the Court adopt the test that the offenses should be deemed the same unless they are aimed at a distinct social evil.[22] However, what petitioner is really seeking in this phase of his argument is a much more basic change in the judicial resolution of issues of multiple sentencing and double jeopardy, akin to the change he wishes to make in the determination of the character of the offense for statutory purposes. Petitioner assumes that this case must be decided, for double jeopardy purposes as well as for statutory construction, on his premise that the particular facts proved at his trial showed only one act of sale relating to the first three counts of the indictment. It is on that basis that he argues that here there was one social evil proscribed by those three counts. We do not understand him to argue that everything done by one defendant against the narcotic laws is one social evil and therefore one offense. We do not understand

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[22] Petitioner does not urge that this Court adopt the "single transaction" test. This was explicitly rejected in *Morgan v. Devine*, 237 U. S. 632. See also *Gavieres v. United States*, 220 U. S. 338 and *Albrecht v. United States*, 273 U. S. 1. It has never been the rule in the federal courts and is not the rule in most of the states. It is generally recognized, for example, that if by one act, such as throwing a rock through a window with intent to injure the person behind the window, a person damages both property and person, the injury to each is a separate offense. The American Law Institute, in its draft of a model penal code, suggests that offenses arising out of one transaction be prosecuted in a single trial but does not recommend that there be only one punishment if different injuries result from one act. See A.L.I. Model Penal Code, Tentative Draft No. 5, pp. 34-39. Commenting on the single transaction test, the draft points out that "A few jurisdictions recognize the 'same transaction' rule, but have had difficulty in defining it and in applying it consistently." (*op. cit.*, p. 36).

him even to argue that separate sales on different days or even separate purchase, transportation and sale of the same narcotics would still be one social evil, subject, under his suggestion, to only one punishment as a matter of constitutional double jeopardy. What he is arguing is that, where the facts of the particular case show one act by the defendant, separate punishment should not be imposed unless the resultant evils are different.

His assumption—that, in determining issues of double jeopardy, the courts look to the particular facts of the particular case, rather than to the general offenses as such—is exactly the one which this Court has refused to make in all of the decisions referred to above. *Blockburger* and the other decisions of this Court in this field, whether put in terms of statutory interpretation or double jeopardy, all embody the concept that issues of multiplicity of offenses are to be determined from the *elements* of the *offenses as defined in the statute*, without relation to the particular factual circumstances under which the crimes were committed in the particular case. This approach has not been overruled or modified in any of the later cases which have indicated a tendency to define offenses under particular statutes more broadly than was done in some of the earlier decisions arising under other statutes.

Without attempting to cover all the rulings of this Court, we think discussion of a few leading cases will illustrate the point. In *Ebeling* v. *Morgan*, 237 U.S. 625, this Court held that the cutting of six mail bags in the course of one transaction constituted six separate crimes. Looking at the face of the statute, the Court found that the evil against which Congress was legislating—the offense—was the cutting of *any* mail bag,

and that therefore each cutting was a separate offense. On the rationale that only the elements as defined in the statute are to be considered, that decision is eminently logical. The Court did not consider it relevant that, on the particular facts in the case before it, the cutting of six mail bags was by one act or closely related acts.

In *Burton* v. *United States*, 202 U.S. 344, the Court ruled that separate offenses were committed by a Senator in unlawfully receiving compensation and also agreeing to receive compensation in violation of the same statute. The Court said, 202 U.S. at 377:

> Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute.

Again, on the face of the statute, there can be no doubt that Congress did consider *agreement* to take a bribe an evil and also considered the *taking* of a bribe an evil. Undoubtedly, also, there can be factual situations where the agreement to take is in fact sufficiently separate from the actual taking of the bribe so that there would be a general consensus that the acts are separate and distinct. In the Court's approach it was therefore

not material whether *in the particular case* the agreement and the taking happened to coincide.

Similar in character is *Albrecht* v. *United States*, 273 U. S. 1, where, under the National Prohibition Act, a defendant was convicted of possession and sale of the same liquor at the same time. Certainly, possession of liquor under prohibition was itself an evil, and that possession could be sufficiently long antecedent to an act of sale to be in fact a separate crime. Looking to the evils as defined by the legislature, the decision in that case that the evils are separate is entirely sound, even though the possession and sale of the same liquor may coexist in the particular case.

The extent to which the difference in result depends upon whether the problem is approached from the general—*i.e.*, the statute—or the specific—*i.e.*, the facts of the particular case—is strikingly illustrated by comparing the ruling of this Court in *United States* v. *Michener*, 331 U. S. 789, with the decision of the Eighth Circuit in that case which this Court reversed, 157 F. 2d 616. There, the issue was whether consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting and a second count charging that, on the same date as that set forth in the first count, the defendant caused a plate to be made. Looking at the facts of the case as spelled out in the indictment, the Eighth Circuit held that the possession and causing of the plate to be made were so intertwined that two offenses had not been committed although the court conceded that "under a possible state of facts one could properly be convicted of the two offenses charged in the indictment", 157 F. 2d at 618. While this Court, in reversing, did not write an opinion beyond citing its earlier decisions, some of which have been discussed

above, it is evident from its citation of those opinions that the Court was looking at the problem more generally, that it was holding that Congress had legislatively determined that possession was an evil separate from the making of the plate, and that therefore the two offenses were separate.

The later decisions by this Court do not involve a change in this attitude. In *Bell* v. *United States*, 349 U. S. 81, the Court expressed no doubt that, if it were clear that Congress intended to punish separately the simultaneous transportation of two women, the transportation would result in multiple offenses, thus indicating that it was *the offense as defined by Congress* which was the question at issue. Similarly, in *United States* v. *Universal Corp.*, 344 U.S. 218, the Court was merely finding the unit of the crime as defined by Congress. While holding that violations of the Fair Labor Standards Act could not be separated into individual offenses with respect to each employee, the Court nevertheless affirmed the treatment of each different *kind* of violation as separate offenses, *e.g.*, (1) payment of less than 75 cents per hour, (2) underpayment of overtime, and (3) failure to keep proper records. The Court noted (344 U. S. at 221, fn. 4):

> Appellee does not urge in this case that § 15 prescribes only one offense even if there are three kinds of violations. Such an argument seems to have been made and was rejected, as to distinct requirements under two different sections of the act there involved, in *Blockburger* v. *United States*, 284 U. S. 299, 305, where the penal provision applied to "any person who violates or fails to comply with any of the requirements of this act."

Prince v. *United States*, 352 U. S. 322, also deals with the statute as such, finding on the basis of legislative history that Congress did not intend to punish both entry and a completed robbery after entry.

An illuminating decision on this point is *Sealfon* v. *United States*, 332 U. S. 575, where this Court, although it adopted a liberal rule of *res judicata*, reaffirmed the long established rule that issues of double jeopardy depend only upon the question of whether the offenses, as defined, are different. The Court ruled that the *offenses* of conspiracy and the substantive crime were separate, even though, on the *res judicata* aspect, it found that the "basic facts in each trial were identical" (332 U. S. at 580). What this decision has in practical effect accomplished is that, without overturning the long established rule that issues of double jeopardy depend only upon the offenses as defined, this Court has made trial for a related offense after an acquittal turn largely on how close two theoretically separate offenses are to each other in a particular factual situation. And there have been, since *Sealfon*, very few cases which have raised issues of retriability after acquittal.[23] Cf. *United States* v. *Adams*, 281 U. S. 202, 205, which drew the same distinction between double jeopardy and *res judicata* but was stricter in its interpretation of what had been previously adjudicated.

There is, we think, a ready explanation of why there has not been, and should not be, any equivalent develop-

[23] *Abbate* v. *United States*, No. 534, now before this Court, involves retrial after conviction by another sovereignty, and therefore presents quite different issues.

Since *Sealfon*, the only case of retrial after acquittal which the Court has considered is *United States* v. *Williams*, 341 U. S. 58, where the new trial was for the very different offense of perjury.

[Footnote 23 continued on page 46]

ment with respect to issues of double jeopardy in the context of consecutive sentencing. In the context of sentencing, any issues as to whether, in a particular factual setting, separate offenses are so related that multiple punishments should not be imposed to satisfy the ends of justice, in that particular case, can best be resolved by the trial judge. That is, in essence, where the prior decisions of this Court have left the matter, as the *Blockburger* decision itself indicates. The Court said in *Blockburger* (284 U.S. at 305):

> * * * Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court,

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[Footnote 23 continued from page 45]

(*Yates* v. *United States*, 354 U. S. 298, 335, did not involve a prior acquittal.)

In the Courts of Appeals, convictions were reversed on the basis of *Sealfon* in the following cases: *Simon* v. *United States*, 225 F. 2d 260, 262 (C. A. 3), where prosecution for possession was held precluded by a previous acquittal for receiving; *Cosgrove* v. *United States*, 224 F. 2d 146, 153, 157 (C.A. 9), involving conspiracy and aiding and abetting in different counts of one indictment when the jury had disagreed as to the retried counts; *Yawn* v. *United States*, 244 F. 2d 235, 237 (C.A. 5), involving trial for conspiracy after acquittal on a charge of possession.

Convictions were affirmed despite a *res judicata* argument in *United States* v. *Kaadt*, 171 F. 2d 600, 605 (C.A. 7), where, after acquittal for mail fraud, a defendant was tried for shipping misbranded drugs—an offense not requiring intent; *Kenny* v. *United States*, 236 F. 2d 128, 130 (C.A. 3), certiorari denied, 352 U. S. 894, involving retrial after disagreement on the count retried, where the reasonable interpretation was that the jury had not determined the fact at issue on retrial; and *United States* v. *Curzio*, 170 F. 2d 354 (C.A. 3), where on the prior acquittal for conspiracy, the trial judge had made it clear that he found no concert of action.

with whose judgment there is no warrant for interference on our part.

This seems to us to indicate that the Court expected that trial judges would take into consideration in imposing sentence, among other things, the relationship of particular counts to each other on the particular facts before the Court. Neither Congress, in defining offenses, nor this Court, by formulating general rules of law, can provide a standard for the imposition of sentences which will satisfy the just purposes of the criminal law for each and every particular fact situation which may arise. Under our system of administering the criminal law we must rely largely on the sound discretion of the sentencing judge who, having all the facts before him, is peculiarly able to determine what sentences will be in the best interests of both society and the individual defendant. Although it is accepted practice for the Government to charge a single transaction in multiple counts,[24] trial judges do not generally impose consecutive sentences for one act in the absence of aggravating circumstances.

Thus, the annual reports of the Director of the Administrative Office of the United States Courts for the years 1954-1957 (Table D4) show the following with respect to defendants in narcotics cases (not in-

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[24] From the point of view of indictment and trial, separate counts serve a very useful function in narrowing issues and clarifying the basis of a jury's verdicts. In narcotics cases, for example, there have recently been issues as to whether an apparent seller is merely acting as agent for a buyer. *E.g., Adams* v. *United States*, 220 F. 2d 297 (C.A. 5). Inclusion of a count under 21 U.S.C. 174 which covers concealment and transportation as well as sale would serve to clarify issues in such a case.

cluding marihuana) in the 86 district courts (*i. e.*, not including the District of Columbia and Alaska):

Year	No. of defs. Convicted	No. sentenced to Imprisonment	Sentences Under 5 yrs.	Sentences 5 yrs. or over	Average Sentence by months
1957	1049	941	344	594 [25]	70.3
1956	1027	880	609	269	47.1
1955	1153	982	672	306	46.3
1954	1136	934	692	240	43.1

Since 5 years was the permissible maximum for one offense by a first offender in the years 1954-1956, and for some offenses the minimum after the 1956 Act, it is unfortunate that the statistics do not separate the five-year sentences from those for longer periods. The figures do indicate, however, that multiple sentences of more than the maximum permitted for one offense imposed for one transaction must be infrequent since the figures for those receiving sentences longer than five years would include persons making more than one sale as well as recidivists.

A study of District of Columbia cases prepared for the Senate Judiciary Committee covered the years 1952-1954 and the first half of 1955. Again, the figures do not show, except occasionally and incompletely, whether sentences were consecutive or concurrent, nor do they reveal how many transactions were involved. However, out of 629 persons sentenced in that period, only 142 received sentences of more than the five years permissible for a first offender on any one offense and of that number only 49 received sentences of ten years or more. See Hearings before the Subcommittee on Improvements in the Federal Criminal Code, of the Committee

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[25] The remaining sentences were under the Federal Youth Corrections Act, 18 U.S.C. § 5010.

on the Judiciary, United States Senate, 84th Cong., 1st Sess., pursuant to S. Res. 67, part 4, p. 1244.

Of the 142 District of Columbia sentences referred to above, 104 appear with more specificity in the individual listing of 447 cases prepared for the Hearings on the Traffic in and Control of Narcotics and Barbiturates before the Committee on Ways and Means of the House of Representatives, 84th Congress. Of those 104, 57 involved recidivists. Of the remainder, 34, it appears from the number of counts charged, clearly were based on multiple transactions. In five cases, including petitioner's, consecutive sentences seem to have been imposed for one transaction where other separate transactions were also charged in the indictment. Eight others appear to involve only one transaction, although it is impossible to determine whether, on the facts, there was evidence showing more than the mere act of sale. The average sentence for the District of Columbia in 1954 was 72 months (See Hearings, *op. cit., supra,* p. 1230). While no similar special study which would indicate sentences by counts, rather than in total, is available for the period since enactment of the Narcotic Control Act of 1956, it seems likely that, with the enactment of higher minimum penalties as the result of that Act, consecutive sentences based on one transaction will be even more infrequent.

Since the cases where consecutive sentences are imposed are the ones most frequently litigated, the problem tends, at the appellate level, to appear larger than it actually is. The possible inequality that may result from multiple counts in one district and not in others is really no greater than the possible inequality that results from the discretion given different judges to affix punishment. Indeed, as we have shown, *supra,* in the

years that followed *Blockburger*, the difficulty which Congress found in the action of sentencing judges in narcotics cases was, not that they were multiplying penalties, but that total sentences were far below the permissible sentence for any one offense.

Even where judges have imposed consecutive sentences despite the close relationship of multiple counts to each other, it will frequently be found that the total sentence could have been imposed on other counts without posing any issue as to multiplicity. An example is the sentence before this Court in *Bell* v. *United States*, 349 U. S. 81, where the sentencing judge imposed consecutive sentences of two and a half years on two counts (subsequently held by this Court to be one) when he could, under the statute, have accomplished the same result by imposing a five year concurrent sentence on those counts.

The situation in this case is not very different. Petitioner made two sales on two different days. These are two separate offenses on any theory and, as imposed, support ten years of the fifteen year sentence.[26] Even the third five year sentence is not as unrelated to the

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[26] Petitioner received consecutive sentences on counts 1, 2 and 3 for the first sale, and for the second sale sentences on counts 4, 5 and 6, to run concurrently by the counts and concurrently with those on 1, 2 and 3. (R. 5) Thus, counts 2 and 4 run consecutively to each other, even if all counts for the second sale are concurrent with count 1. Even assuming that punishment for the three offenses as to each sale should be merged in each other, there is no requirement that the sentence depend on any particular count. See Brief for the United States in Opposition, p. 3, *James Jones* v. *United States*, No. 446, Misc., certiorari denied, March 31, 1958. Thus, all three sentences for the first sale may depend on count 2, and all for the second sale on count 4. Consecutive sentences for the two separate offenses in counts 2 and 4 are therefore valid on any theory and petitioner's contention (Pet. Br. 50, fn. 30) that only one sentence may be sustained is without merit.

facts of this case as petitioner would make it appear. As noted, the indictment on its face charges, in the separate counts, not merely sale, but purchase and transportation as well. The evidence in this case was, as to each date, not only that petitioner sold narcotics each time, but that each time he left the apartment and came back before he made the sale, giving rise to an inference (at the very least) that he actually transported the narcotics before he made the sale and a possible further inference that he went out to purchase the narcotics so transported and sold. Even if a single act of sale, without such additional evidence and inference, should be regarded from a factual standpoint as a single offense, the evidence here was sufficient to establish, at the least, the factually separate offense of transportation and to justify a consecutive sentence for that offense.

We do not consider it necessary for the Court to decide any such issue as to the sentence in this case, even if the Court should wish to reconsider the *Blockburger* ruling. The impact of any such reconsideration on this sentence and the right of a defendant to assert on collateral attack that the transportation charged in the indictment was not proved could be resolved on remand at the district court level. The point that we stress is that the problem is not nearly as broad as petitioner would make it appear. Petitioner's whole argument, both on statutory construction and double jeopardy, resolves itself, upon analysis, into a contention that, on the particular facts of this case and assuming that there were only two acts of sale, the imposition of three sentences is unfair. The entire argument is based on a factual assumption as to a particular situation, and is therefore not really addressed to the purpose of Congress in defining the offenses or the separateness of the

offenses for the purpose of double jeopardy. The principle that multiple punishment amounts to double jeopardy applies only when the offenses as defined by Congress are the same. That, as we have shown, is not the case here. The offenses, as defined by Congress for all the various situations they may cover, are separate—whether the test is the different elements of each crime or the separate functions which they serve. What petitioner is really seeking is a new rule of sentencing that a judge should not be permitted to impose consecutive sentences where, on the facts of a particular case, offenses relating to one general social evil are committed by one act. He is really asking this Court to review the action of the district judge in imposing three sentences on the particular facts of this case, because, in his view, there were only two acts having the same anti-social motive. That problem is not a basis for distorting the purpose of Congress in creating three offenses or for overturning long established principles for determining when offenses are separate for the purpose of the jeopardy clause. *Blockburger* and the other decisions of this Court, applying the legislation Congress has enacted, have left it to the sentencing judge, who has the available facts and reports, to determine whether consecutive sentences should be imposed in the light of all the circumstances of a particular case, including the circumstances under which the offenses were committed. That is where, historically, decisions as to sentencing have been made. We submit that is where the issue should remain, unless and until Congress changes the legislation. And, as we have pointed out, we do not believe that, even on petitioner's theory, the total sentence in this case is invalid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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